REMARKS

Reconsideration and allowance in view of the foregoing amendments and the following remarks are respectfully requested.

Upon entry of this Amendment, claims 1, 3-9, 11, 12, 14-19, 22, 24-29, and 31-51 will be pending in the present application. Claims 20, 21, and 30 have been cancelled by this Amendment.

Claims 1, 3-22, 24-31 stand rejected under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 6,305,374 to Zdrojkowski et al. ("the '374 patent") in view of U.S. Patent No. 5,715,390 to Hoffman et al. ("the '390 patent") in further view of U.S. Patent No. 5,725,559 to Alt et al. ("the '559 patent"), in further view of U.S. Patent No. 5,881,379 to Beier at al. ("the '379 patent"). In addition, claims 32-51 stand rejected under 35 U.S.C. § 103 as being unpatentable over the '374 patent in view of the '390 patent, the '559 patent, and the '379 patent in further view U.S. Patent No. 6,094,702 to Williams et al. ("the '702 patent"). Applicant respectfully traverses these rejections for the reasons presented below.

Applicant takes the position that the '374 patent does not teach or suggest causing a controller to execute a second operating routine so that the pressure generating system operates according to a second set of operating features. At best, the '374 patent teaches setting various parameters for the mode of pressure support being delivered to the patient, such as the EPAP, IPAP, breath per minute, and % IPAP settings. However, changing these parameters, which is done manually by the user, does not correspond to upgrading the pressure generating system by causing the controller to execute a second operating routine. To clarify this point, claim 1 has been amended define the controller as controlling the operation of the pressure generator according to a first operating routine and at least one user defined setting. The user defined setting corresponds to the EPAP, IPAP, breath per minute, and % IPAP settings. Thus, there is now a distinction in claim 1 between the operating routine and the settings that are input to the operating routine. Applicant respectfully submits that the '374 patent does not teach or suggest both these features of claim 1.

Claim 1 has also been clarified to indicate that upgrading the pressure generating system is accomplished by replacing the first operating routine with a second operating routine and causing the controller to execute the second operating routine so that the pressure generating system operates according to a second set of operating features and the user defined setting. Applicant submits that the '374 patent does not teach or suggest replacing one operating routine with another - again noting that the operating routines are not the parameters input by the user that used to set the variables provided to the operating routine.

In Section 5, part (2) on page 17 of the December 31, 2007 Final Official Action, the Examiner alleges that the '374 patent teaches operating at various pressures. Apparently, the Examiner takes the position that a pressure support system that can be set to operate at different pressure corresponds to operating according to either a first operating routine (pressure 1) or a second operating routine (pressure 2). Because claim 1 has been amended to clarify the difference between an operating routine and manually set parameters, applicant believes that this position espoused by the Examiner can no longer be maintained.

Applicant again respectfully submits that the '390 patent is not from an analogous art to the '374 patent, and, thus, should not be applied in combination with the '374 patent to reject the pending claims. To this, the Examiner has noted that the '390 patent is analogous to the '374 patent because the '390 patent deals broadly with upgrading electric devices and the device and system of the '374 patent is a device which runs electronically. Applicant respectfully submits that this reasoning does not comport with US patent law with respect to non-analogous art.

Under US patent law is not enough that that both devices merely be electronic devices for them to be considered analogous art. The secondary reference must be a reference that one of ordinary skill in the art, which in this case is an engineer developing prescription medical products, would have logically looked to so solve a problem dealing with upgrading a medical device. The medical device field is riddled with FDA regulatory issues, patient safety concerns, and issues specific to the medical community. The Examiner's conclusory statement that places all electronic devices as analogous art, ignores these practical problems unique to the

medical device world, and broadly casts the analogous art net too broadly and does not explain why the secondary reference is reasonably pertinent to the problem facing the inventor. The fact that the '390 patent deals broadly with electric devices does not explain how it reasonable pertains to the medical device world.

Applicant further notes that the Examiner has not explained why one skilled in the art would be motivated to modify the '374 patent. Examiners has not set forth a reason for combining the '374 patent and the '380 patent, i.e., why a highly secure method of upgrading a medical device is even necessary from the teachings of the '374 patent and '380 patent. The Examiner appears to be drawing an inference that this would be desirable, but has not set forth any suggestion existing in the prior art in support of that inference. Also, the mere fact that the concept of securely upgrading a device or controller in the '380 patent can be applied to a variety of devices and machines is not sufficient. The fact that elements of the claimed invention exist in the known art does not by itself provide the motivation to make the claimed invention. *See, e.g., In re Newell*, 13, U.S.P.Q.2d 1248 (Fed. Cir. 1989). Furthermore, even the mere fact that the prior art teachings *can* be combined does not support a rejection based on these references. *See, e.g., In re Fitch*, 23 U.S.P.Q.2d 1780 (Fed. Cir. 1992).

The Examiner cites the '559 patent as teaching the step of "maintaining a database". Claim 1 has been amended above to clarify that the database is kept at a location that is external to the pressure support systems and that the database includes a serial number that is unique to each pressure generating system in the plurality of pressure systems maintained in that database. In addition, claim 1 recites that updating the database includes assigning a new serial number for an upgraded pressure generating system.

The '559 patent does not teach providing a database having these features. First, the '559 patent teaches providing a database <u>in the implanted device</u> that contains a plurality of programs and a key associated with each program. See FIG. 4A and col. 9, lines 10-15, of the '559 patent. Second, the database stored in the implanted device of the '559 patent, does not, and need, not contain a serial number unique to each pressure generating system in the plurality

of pressure systems contained in the database. Nor does the '559 patent teach or suggest changing this serial number when a device is upgraded.

In item (4) on page 18 of the December 31, 2007 Final Official Action, the Examiner explains that the "product identifier" has been interpreted broadly to correspond to an unique identifier for a segment of data, thus enabling the Examiner to cite the '379 patent as teaching the final step of claim 1. Applicant respectfully submits that the change in claim 1 to indicate that the database contains a serial number, clarifies that this number identifies an overall product, and not a segment of data.

The above discussion has focused exclusively on independent claim 1. Applicant submits that the distinctions pointed out above with respect to independent claim 1 are equally applicable to independent claims 12, 22, 32, and 49, which have also been amended, in general, along the lines noted above with respect to claim 1. For example, claims 12, 22, 32, and 49 have been amended to replace "product identifier" with "serial number". The additional citation to the '702 patent with respect to claims 32-51 fails to provide the features of the independent claims missing from the '374 patent, the '390 patent, the '559 patent, and the '379 patent.

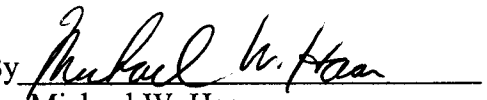
It should be noted that the applicant has not addressed each rejection of the dependent claims. Any rejection of a dependent claim not specifically addressed is not to be construed as an admission by the application of the correctness of that rejection. Rather, the applicant believes that the independent claims are patentably distinguishable over the cited references for the reasons noted above, so that the rejection of the dependent claims need not be addressed at this time. Applicant reserves the right to address the rejection of any dependent claim at a later time should that become warranted.

For the reasons presented above, applicant respectfully submits that independent claims 1, 12, 22, 32, and 49 are not rendered obvious by the cited references. In addition, claims 3-9, 11, 14-19, 24-29, 31-48, 50 and 51 are also not rendered obvious due to their dependency from independent claims 1, 12, 22, 32, or 49. Accordingly, applicant respectfully requests that the above rejections of claims 1, 3-9, 11, 12, 14-19, 22, 24-29, and 31-51 be withdrawn.

Claims 20, 21, and 30 have been cancelled, thereby rendering their rejection moot. The cancellation of these claims is not to be construed as an admission as to the correctness of the rejections of these claims. On the contrary, the application reserves the right to prosecute claims 20, 21, and 30, or claims of similar scope, in a further continuing application.

All rejections have been addressed. It is respectfully submitted that the present application is in condition for allowance and a Notice to the effect is earnestly solicited.

Respectfully submitted,

By 

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Note: The Commissioner is authorized to charge any fee required under 37 C.F.R. §§ 1.16 or 1.17 to deposit account no. 50-0558.